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Supreme Court of the United States

OCTOBER TERM, 1962

No. 73

MADELINE C. SCHROEDER,

Appellant,

against

THE CITY OF NEW YORK,

Appellee.

OBJECTIONS TO APPLICATION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

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Supreme Court of the United States

OCTOBER TERM, 1961

No. 763

MADELINE C. SCHROEDER,

Appellant,

against

THE CITY OF NEW YORK,

Appellee.

OBJECTIONS TO APPLICATION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

This memorandum is submitted in opposition to the application of Messrs. Goldstein & Goldstein and certain other attorneys for persons who are not parties to this case for leave to file a brief as *amicus curiae* in opposition to the appellee's motion to dismiss the appeal on the ground that it does not present a substantial federal question.

The question presented by this appeal, briefly stated, is whether notice by publication and posting, pursuant to Section K41-8.0 of the Administrative Code of the City of New York (hereafter referred to as the Water Supply Act) of an application for the right to divert water flowing past the appellant's property constituted sufficient notice under the Due Process Clause of the Federal Constitution (Jurisdictional Statement, p. 3; Motion to Dismiss, p. 2).

ARGUMENT

In view of the fact that the points which the applicants seek to argue are extraneous to the record, or relate to new issues not raised by the parties, or were adequately presented by the parties, the application for leave to file an *amicus curiae* brief should be denied.

(1)

As a first point the applicants seek leave to stress "the actual and deliberate manner in which the constructive service was made so as to attract the attention of as few interested parties as possible." Such argument, although extraneous to the record, was made by the appellant. Apparently the applicants merely want to stress or place different emphasis on the point. (Application for Leave to File *Amicus Curiae* Brief, pp. 2-3.) This is not a proper role for an *amicus curiae*.

The appellant's brief before the New York Court of Appeals admitted compliance with the notice provisions contained in the Water Supply Act. Such brief stated (p. 2):

> "In making the aforesaid application to acquire its title, the City complied with the notice provisions of the statute contained in § K41-8.0 which is set forth later herein."

And on page 6:

> "There is no contention in the complaint that the City has failed to comply with the requirements of Title K41. The sole and only contention upon which the plaintiff claims her right to an injunction, is that she received no notice and that the requirements of

> the Water Supply Act with regard to notice were inadequate and failed to comply with federal and state constitutional requirements of due process of law (fols. 49-50)."

And again (p. 48):

> "There is nothing in the complaint which suggested that the City has failed to comply with the requirements of the Water Supply Act. Neither the complaint nor the reply take issue with the fact that the Water Supply Act lays out certain requirements which were all followed by the City. Consequently, the first affirmative defense raises no issue in this case."

The Jurisdictional Statement (p. 3) admits "compliance with the letter of the statute" and the Appellant's Brief Opposing Motion to Dismiss (p. 15) admits compliance with the strict letter of the statute.

These admissions are binding on appellant (5 C.J.S., *Appeal & Error*, § 1344).

In spite of these admissions of compliance with the statute the appellant argued in the New York Court of Appeals and in Appellant's Brief Opposing Motion to Dismiss (pp. 4-7) that the manner of publication and posting in this case was not such as could be expected to give notice. In an effort to support such argument the appellant went outside of the record and charged that the appellee made a deliberate effort to hide the published notices and handbills (Appellant's Brief Opposing Motion to Dismiss, pp. 5, 6, 11, 21). This charge is, of course, not supported by the record and is emphatically denied.

The record shows that the notice was published in the City Record and in two newspapers published in the City of New York and in two newspapers published in Orange County; that the notice was published once each

week for at least six weeks immediately previous to the return date of the motion for permission to divert (R. 23-24); that the handbills were posted for the same period of time in twenty-two conspicuous places (R. 33-34, 36); that the handbills were posted in specified places in the vicinity of the real estate to be affected (R. 34-36); and that due and proper notice of the application was given as required by law (R. 51). The record does not set forth the particular newspapers, other than the City Record, in which the notice was published nor does the record state, or suggest, that there was any attempt, deliberate or otherwise, to publish or post the notice in any manner except such as would be calculated to come to the attention of the owners of properties to be affected.

Arguments that the notice was published and posted otherwise than as set forth in the record or in accordance with the statute, or that there was a deliberate attempt to publish and post the notice where it was not likely to be seen should not be considered even when presented by the appellant (See 5 C.J.S., *Appeal & Error*, §§ 1326, 1327).

Now the applicants seek permission to "stress" these same improper arguments.

Even if these arguments were supported by the record and properly made the applicants should not be permitted to file a brief as *amicus curiae* for the purpose of repeating and stressing them because the arguments have already been completely presented by the appellant.

(2)

The second point the applicants seek to argue is that the statute is defective because it does not require indexing in the County Clerk's office against the names of record owners of properties in which an interest or easement may be acquired.

This is a new question not presented to any of the courts below by either party. Therefore this point could not properly be urged by an *amicus curiae* (3 C.J.S., *Amicus Curiae*, §§ 3c, 3e(2), (8), (9aa)).

(3)

The third point the applicants seek to cover in their *amicus curiae* brief is "the effect of this statute upon the interests of mortgagees, infants, incompetents and absentee owners."

The record in the present case does not refer to the interests of mortgagees, infants, or incompetents and the parties did not raise any issues respecting such interests in any of the courts below nor on this appeal. Therefore, applicant's proposed third point with respect to such interest would not be the proper subject for the brief of an *amicus curiae*.

To the extent that the proposed point relates to the interests of absentee owners, the question has been adequately covered by the parties (Motion to Dismiss, pp. 2, 4, 7; Appellant's Brief Opposing Motion to Dismiss, pp. 1-3).

(4)

The applicants seek in a fourth point to argue that the Water Supply Act is defective because it allegedly fails to provide for the payment of awards to owners of rights to the uninterrupted flow of water past their properties.

This is a reference to Section K41-18.0 of the Water Supply Act which limits the time within which owners may apply for damages to three years and bars claims not filed within that time.

The appellant in the present case chose to challenge only the notice provisions contained in Section K41-8.0 of the statute (R. 15, 17; Jurisdictional Statement, pp. 2,

3, 12). The appellant not only admits but asserts that under Section K41-18.0 claims not filed within three years are barred (Jurisdictional Statement, p. 4). In other words her position was and is that the statute of limitation provision contained in Section K41-18.0 is constitutional provided adequate notice is given but she argues that the statute is unconstitutional because the notice provisions contained in Section K41-8.0 are allegedly constitutionally inadequate.

CONCLUSION

The application for leave to file a brief as *amicus curiae* should be denied.

April 12, 1962.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1962.

No. 75.

MADELINE C. SCHROEDER,
Appellant,

against

THE CITY OF NEW YORK,
Appellee.

BRIEF FOR GOLDSTEIN & GOLDSTEIN AS *AMICUS CURIAE.*

GOLDSTEIN & GOLDSTEIN,
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BENJAMIN M. GOLDSTEIN,
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THE REPORTER COMPANY, INC., Walton, N. Y.—UN 5-4151—1962

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Supreme Court of the United States

OCTOBER TERM, 1962.

No. 75.

MADELINE C. SCHROEDER,

Appellant,

against

THE CITY OF NEW YORK,

Appellee.

BRIEF FOR GOLDSTEIN & GOLDSTEIN AS *AMICUS CURIAE.*

The undersigned had applied to this Court for permission to file a brief as *amicus curiae* on behalf of the following law firms:

Goldstein & Goldstein	274 Broadway, Monticello, New York
Cooke & Willis	236 Broadway, Monticello, New York
Newberg & Sakofsky	South Fallsburgh, New York
Harry C. Resnick	South Fallsburgh, New York
William F. Norton, Jr.	26 Broadway, New York 4, New York

This Court granted such permission on April 30, 1962.

Each of the above named law firms represent clients who are owners of riparian properties along the Neversink River downstream from the Neversink Dam, several of whom are upland owners of rights of way in their deeds across riparian properties and to the use of the Neversink River for various purposes including mainly fishing, bathing and boating. These property owners did not file their respective claims for compensation within the three-year statute of limitations for the rea-

son that these owners did not know of the taking of a portion of their property by the appellee until after the appellee claimed that the statute of limitations had expired.

The said attorneys represent approximately 70 different claimants who have been barred from the hearing of their claims and compensation to this time, although there are other claimants represented by other counsel who are not mentioned above.

There were many glaring defects in the so-called notice that had been posted and published by the appellee, some of which will be called to the Court's attention in this brief.

1. The appellee having made a motion to dismiss the complaint for insufficiency, the facts therein must for the purposes of this motion be presumed to be true, so deemed, appellant herein did not learn or know that the City of New York had acquired an interest in her property and that she had a right to file a claim (fol. 14, p. 13 of the transcript of record). Likewise deemed true is that she never had been notified in any manner that the City sought to acquire the right to divert the Neversink River (fol. 14), or that she had any knowledge, either constructive, actual or implied, of such proceedings prior to retention of counsel (fol. 15).

2. We submit that the proceedings before the Board of Estimate and Apportionment in 1927 and 1928 and the modification of the map and profile of 1938 (fols. 20-22) were similarly without proper notice to the persons most affected by the City's plan. It, at least, gives impetus to the claim of the appellant and all others similarly situated, particularly since the City let the matter lie dormant until 1952 when it suddenly and without any further notice, except by posting and publication, activated these proceedings by designating five

sections to cover forty miles of territory or eighty miles of river-front property. As to these eighty miles of river-front property affected by the taking, the City had placed approximately one hundred posters in the winter-time where and when few people could see them. We submit such notice was improper to give notice to the appellant or any other riparian owner of the taking for the following reasons:

(A) The so-called notice which had been posted on January 22, 1952, bears date January 10, 1952, and had been made returnable at the Dutchess County Court House in the City of Poughkeepsie, New York, on March 14, 1952. This notice, aside from the title, reads as follows:

> "PLEASE TAKE NOTICE that it is the intention of the Corporation Counsel of the City of New York pursuant to the provisions of Title K of the Administrative Code of the City of New York to make application to the Supreme Court of the State of New York at a Special Term thereof to be held at the Dutchess County Court House, in the City of Poughkeepsie, County of Dutchess, New York, in the Ninth Judicial District, on the 14th day of March, 1952, at the opening of Court on that day, or as soon thereafter as counsel can be heard thereon, for the appointment of three Commissioners of Appraisal to ascertain and determine the compensation to be made to the owners and all persons interested in certain real estate affected for the purposes indicated in said Title K of the Administrative Code of the City of New York as shown upon a certain map entitled:
>
> 'Neversink Riparian Section No. 4—Board of Water Supply of the City of New York, map of Real Estate Situated along the Neversink from the vicinity of Cuddebackville to the vicinity of Huguenot, in the Town of Deerpark, County of Orange, State of New York.'

adopted by the Board of Estimate November 15, 1951, and filed in the office of the County Clerk of Orange County on December 5, 1951, as Parcels Nos. 219 through 306 and 423 through 430, both inclusive.

The petitioner by this proceeding seeks to become vested with the right and easement in perpetuity in and against all of the parcels of real estate above described and shown on the aforesaid map to divert all or any part of the waters of the Neversink River and its tributary watershed originating above the Neversink Dam DESCRIBED IN THE PETITION HEREIN, either continuously or from time to time, and in such quantities as the operating needs of the City of New York as determined by it, may require together with the right from time to time to release and discharge into Neversink River below the Neversink Dam waters impounded in the Neversink Reservoir (fols. 30-32).

Dated: January 10, 1952." (Emphasis ours.)

The petition had been dated and verified on February 15, 1952 (fols. 48 and 49, pp. 33 and 34 of the transcript of record). The notice dated January 10, 1952, which had been posted and published by the appellee had pre-dated the petition by one month and five days and had therefore been predicated upon a petition which had not been in existence at the time of the posting and publication thereof. It certainly was not in existence for six weeks prior to the hearing on March 14, 1952, as required by Title K, Section 41-8.0 of the Water Supply Act. Where could any person see or examine the premises "which the petitioner (appellee) by this proceeding seeks to become vested with the right and easement in perpetuity in and against all of the parcels of real estate * * * described in the petition herein * * *" when there was no petition in being at the time.

A notice such as this predicated upon a petition without a petition was a nullity and therefore this appellant and all other riparian claimants had been deprived of their property without due process of law, particularly where, as here, no personal notice was given to them and the petition was not in existence for six weeks following posting and publication as required by Section K 41-8.0 of the Water Supply Act.

(B) Here, we submit, that the entire proceedings were also defective. The proceedings had been entitled, New York Supreme Court; Ninth Judicial District. There were and still are five counties within the State of New York comprising the Ninth Judicial District. The City would have required the appellant herein and all other riparian claimants to ferret out the particular county where the proceedings had been pending to see in which county the petition, the notice and the other necessary papers had been filed. Had the appellant or any other riparian claimant or their respective attorneys gone to each of the five counties which had comprised the Ninth Judicial District, they would not have found either the petition, the notice or other papers on file with reference to this taking by the appellee, for none of these papers had been filed in any County Clerk's Office until May 29, 1952 (a period of two and one-half months after the hearing had been had in the Dutchess County Clerk's Office, and four months and nineteen days after the date of the notice) (fol. 25, paragraph XLIV of plaintiff's complaint, p. 17). To sustain the appellee's position would require the appellant to check the public records practically daily to ascertain if, when and where the appellee had filed its petition for otherwise she would not have known thereof. We submit that such is not the requirements of the Law of Condemnation.